STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 19, 2011

In the Matter of C. I. Morris, Minor.

No. 299470, 299471
Wayne Circuit Court
Family Division
LC No. 08-483987

ON REMAND

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

This termination of parental rights case returns to this Court on remand from the Supreme Court "for reconsideration of the respondent father's appeal in light of the confession of error by petitioner Department of Human Services regarding the failure of it and the Wayne Circuit Court, Family Division, to comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*" *In re C I Morris*, ___ Mich ___; 796 NW2d 51 (Docket No. 142759, decided April 22, 2011). We readopt our original opinion and conditionally affirm the circuit court, but we remand this case with regard to both respondents for further proceedings consistent with this opinion.

At the preliminary hearing, the child's mother and father both indicated that they were of Cherokee descent. This was noted on the order issued after preliminary hearing. The order indicated that the trial court should complete and mail a copy of Form JC48, which is entitled "Notice of Proceedings Concerning an Indian Child." Nothing in the record indicates that such a notice was ever sent in this case.

In 25 USC 1912(a), Congress set forth the following notice requirement:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the

> tribe cannot be determined, such notice shall be given to the Secretary [of the Interior][1] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. . . .

At the time of the relevant hearing in this case, MCR 3.965(B)(9) required the trial court to make inquiry whether the child or either parent was a member of any American Indian tribe or band and, if so, to determine the tribe's identity, notify the tribe, and follow the procedures set forth in MCR 3.980. MCR 3.980 required the court to ensure that the proper notice required by the ICWA had been given, and reiterated 25 USC 1912(a).[2] There is no indication in this case that any notice was ever given in accordance with the statute and court rule.

In *In re IEM*, 233 Mich App 438; 592 NW2d 751 (1999), the respondent mother challenged the termination of her parental rights when the trial court failed to provide notice in accordance with § 1912(a). This Court held that because the testimony "certainly at least suggests that respondent, and consequently I.E.M., potentially qualify as tribal members," "their testimony obligated the probate court to ensure that the FIA [Family Independence Agency] complied with the ICWA's tribal notification requirement." *Id.* at 447. However, this Court determined that termination of the respondent's parental rights was otherwise proper. *Id*. at 450-456. Thus, this Court conditionally affirmed the order terminating the respondent's parental rights but remanded "so that the court and the FIA may provide proper notice to any interested tribe." *Id*. at 450. With regard to instructions on remand, this Court quoted *In re MCP*, 153 Vt 275, 289; 571 A2d 627 (1989), as follows:

> "We . . . remand to the trial court for notice according to the [ICWA]. If the tribe does not seek to intervene, or after intervention the trial court still concludes that the ICWA does not apply, the original orders will stand. If the trial court does conclude that the ICWA applies, further proceedings consistent with the Act will be necessary." [*In re IEM*, 233 Mich App at 450.]

In the present case, petitioner advocates for such a conditional remand. Although respondent father did not further raise this issue in the trial court or on appeal to this Court, this Court can nonetheless provide relief. As explained in *Paschke v Retool Industries*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994):

> [There is a] difference between the obligation of an appellate court and the power of an appellate court. The court is obligated only to review issues that are properly raised and preserved; the court is empowered, however, to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be

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[1] See 25 USC 1903(11), which defines "Secretary" to mean "Secretary of the Interior."

[2] The inquiry and notice are now required by MCR 3.965(B)(2). MCR 3.980 was deleted, effective May 1, 2010, when provisions of the ICWA were incorporated "into specific provisions within various rules relating to child protective proceedings and juvenile status offenses." MCR 3.965, Staff Comment to 2010 Amendment.

> considered and resolved. This is true not only of courts, but of adjudicative tribunals generally. *Margenovitch v Newport Mining Co*, 213 Mich 272, 277-278; 181 NW 994 (1921). This Court is specifically authorized by MCR 7.216(A)(7) to address issues not expressly raised by the parties when, in this Court's discretion, "further or different relief" is required.[3]

We conclude that this matter should be conditionally remanded in accordance with *In re IEM*, 233 Mich App at 450. We find instructive the decision in *In re BR*, 176 Cal App 4th 773, 779; 97 Cal Rptr 3d 890 (2009), in which the court stated:

> We agree with the view taken in *In re Marinna J.* [90 Cal App 4th 731;109 Cal Rptr 2d 267 (2001)], . . . that "it would be contrary to the terms of the [ICWA] to conclude . . . that parental inaction could excuse the failure of the juvenile court to ensure that notice . . . was provided to the Indian tribe named in the proceeding." (*In re Marinna J*, at p 739.) Similarly, the Court of Appeal in *Dwayne P v Superior Court* [103 Cal App 4th 247; 126 Cal Rptr 2d 639 (2002)], . . . held that the juvenile court had a sua sponte duty to ensure compliance with ICWA notice requirements "since notice is intended to protect the interests of Indian children and tribes despite the parents' inaction." (*Dwayne P*, 103 Cal App 4th at 261.) We agree with *In re Marinna J* and *Dwayne P* that the parents' failure to raise the ICWA issue now before us does not prevent us from considering the issue on the merits.

Moreover, in *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 37; 109 S Ct 1597; 104 L Ed 2d 29 (1989) (footnote omitted), the Supreme Court noted:

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[3] We acknowledge that 25 USC 1914 provides:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 USC §§ 1911, 1912, and 1913].

We do not read this statute as precluding relief for a notice violation in the absence of a challenge by one of the specified entities and do not address whether the statute limits those who may bring such a challenge. We note, however, that the statute speaks of a new petition to invalidate. It enables the specified entities to challenge the termination of parental rights after all appeals have been exhausted and the action is final. It does not speak to an action that is still pending. Moreover, the list does not speak to a court's authority to take action in a pending case after becoming aware of a notice violation. Nonetheless, to ensure compliance with the ICWA, our conditional affirmance and remand applies to both parties.

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." [H R Rep No 95-1386, p 23 (1978)]. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid*., and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24.

Unless the tribe receives notice, it is not in a position to assert its rights. Thus, providing a remedy will ensure that the purposes of the statute are met. Moreover, a remedy at this juncture will ensure permanency, finality, and closure as to both respondents. Should the tribe ultimately learn of the failure to give the required notice, it would have grounds to seek invalidation of the order pursuant to § 1914. To provide the child with the greatest stability at this juncture, a conditional remand for the required notice and compliance with the statute is warranted.

Our Supreme Court vacated our original opinion with regard to respondent father. We now readopt that opinion and conditionally reaffirm the order terminating respondent father's parental rights. We remand to the circuit court for proper notice consistent with the ICWA, and for further proceedings as necessary consistent with this opinion. In addition, we conditionally reaffirm the order terminating respondent mother's parental rights, and remand for proper notice consistent with the ICWA and for further proceedings as necessary consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder